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SENATE

REPORT
No. 96-823

CLASSIFIED INFORMATION PROCEDURES ACT

JUNE 18 (legislative day, JUNE 12), 1980.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1482]

The Committee on the Judiciary, to which was referred the bill (S. 1482) to provide certain pretrial, trial, and apellate procedures for criminal cases involving classified information, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended do pass.

PURPOSE OF THE BILL

S. 1482 provides pretrial procedures that will permit the trial judge to rule on questions of admissibility involving classified information before introduction of the evidence in open court. This procedure will permit the government to ascertain the potential damage to national security of proceeding with a given prosecution before trial.

History of the Bill

S. 1482, the Classified Information Procedures Act, was introduced on July 11, 1979, by Senator Biden, Chairman of the Subcommittee on Criminal Justice. The bill was co-sponsored by Senator Kennedy, Senator Bayh and Senator Huddleston.

Introduction of the bill was the culmination of a long period of study. On April 26, 1977, the Subcommittee on Secrecy and Disclosure of the Senate Intelligence Committee requested a staff study of the unauthorized disclosure of intelligence information. Dozens of interviews were held with officials of the Departments of Justice and State, the Central Intelligence Agency, National Security Agency, and Defense Intelligence Agency. Each of those agencies was asked to provide the subcommittee with ten cases in which intelligence information had been passed to foreign powers through espionage or through leaks in the media.

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The subcommittee held hearings on unauthorized disclosure of intelligence information on March 1, 2, and 6, 1978. Witnesses included Admiral Stansfield Turner, the Director of Central Intelligence, former Director of Central Intelligence William Colby, former Deputy Solicitor General Philip Lacovara and then Assistant Attorney General Benjamin Civiletti. Based upon the staff investigation and the hearings, the Subcommittee issued a report, "National Security Secrets and the Administration of Justice." (95th Cong. 2d sess. Report of the Select Committee on Intelligence 1978). The study detailed the problems the government faced in prosecuting espionage and criminal leak cases. The key finding of the subcommittee report was that prosecution of a defendant for disclosing national security information often requires the disclosure in the course of trial of the very information the laws seek to protect. As the report stated:

> The more sensitive the information compromised, the more difficult it becomes to enforce the laws that guard our national security. At times then, regardless of whether the compromise is to a newspaper reported or directly to a foreign agent, the government often must choose between disclosing classified information in the prosecution or letting the conduct go unpunished. In the words of one Justice Department officials who testified before the subcommittee, 'to what extent must we harm the national security in order to protect the national security?'

The report concluded that "Congress should consider the enactment of a special omnibus pre-trial proceeding to be used in cases where national security secrets are likely to arise in the course of a criminal prosecution." Such a procedure would minimize the problem of so-called graymail—a threat by the defendant to disclose classified information in the course of trial—by requiring a ruling on the admissibility of the classified information before trial.

The basic structure of S. 1482 grew out of the recommendations of the Intelligence Committee's Subcommittee on Secrecy and Disclosure. That committee recommended:

> Congress should consider the enactment of a special omnibus pretrial proceeding to be used in cases where national secrets are likely to arise in the course of a criminal prosecution. The omnibus procedure would require the defendant to put the prosecution and the court on notice of all motions or defenses or arguments he intended to make which would require the discovery and disclosure of intelligence information or the use of intelligence community witnesses. The judge would be required to rule in advance of the trial on the admissibility of the intelligence information and on the scope of witnesses' testimony as well as the general relevancy of the motion or defense prior to granting discovery of any intelligence information to the defendant. On the other hand, the defendant would be permitted a discovery motion during the course of trial if the prosecution presents a matter not originally suggested by indictment or for which the defendant could not fairly have been expected to be on notice at the time of the omnibus procedure.

The Subcommittee on Criminal Justice of the Judiciary Committee continued the work done by the Intelligence Committee. Following further investigations, initial draft legislation was prepared. After six months of negotiations involving Congressman Murphy, Chairman of the Legislation Subcommittee of the House Intelligence Committee; Assistant Attorney General Philip Heymann, head of the Justice Department's Criminal Division; representatives of public interest groups; and Senator Biden in his dual capacity as Chairman of the Secrecy Subcommittee of the Intelligence Committee and of the Criminal Justice Subcommittee of the Judiciary Committee, S. 1482 emerged as a bill the key provisions of which were agreed to by the interested parties.

On February 7, 1980, the Subcommittee on Criminal Justice held a hearing at which testimony was received from Mr. Philip Heymann; Brent Rushforth, Deputy General Counsel, Department of Defense; Daniel Silver, General Counsel, CIA; Daniel Schwartz, General Counsel, NSA; Morton Halperin, Center for the National Security Studies; Michael Sheininger, Attorney; Earl G. Silbert, former U.S. Attorney for the District of Columbia; William Greenhalgh, Professor, Georgetown Law Center. All the witnesses supported the basic thrust of the bill. The bill as amended has the support of the Justice Department, all the intelligence agencies, the Association of Foreign Intelligence Officers, the American Civil Liberties Union, and the American Bar Association. The bill was unanimously passed by the Judiciary Committee on May 20, 1980.

Position of the Administration

The Administration fully supports S. 1482, as reported by the Judiciary Committee.

General Statement

The purpose of this bill is to help ensure that the intelligence agencies are subject to the rule of law and to help strengthen the enforcement of laws designed to protect both national security and civil liberties. Too often the duty of the government to protect legitimate national security secrets and to prosecute law breakers have been in conflict. Insofar as possible, S. 1482 resolves that conflict. Assistant Attorney General Philip Heymann summarized the difficulty that the Executive branch has faced in cases involving national security information:

> The government's understandable reluctance to compromise national security information invites defendants and their counsel to press for the release of sensitive classified information the threatened disclosure of which might force the government to drop the prosecution. "Graymail" is the label that has been applied to describe this tactic. It would be a mistake, however, to view the "graymail" problem as limited to instances of unscrupulous or questionable conduct by defendants since wholly proper defense attempts to obtain or disclose classified information may present the government with the same "disclose or dismiss" dilemma.
>
> To fully understand the problem it is necessary to examine the decision-making process in criminal cases involving classi-

fied information. Under present procedures, decisions regarding the relevance and admissibility of evidence are normally made as they arise during the course of the trial. In advance of trial, the government often must guess whether the defendant will seek to disclose certain classified information and speculate whether it will be found admissible if objected to at trial. In addition, there is a question whether material will be disclosed at trial and the damage inflicted, before a ruling on the use of the information can be obtained. The situation is further complicated in cases where the government expects to disclose some classified items in presenting its case. Without a procedure for pretrial rulings on the disclosure of classified information, the deck is stacked against proceeding with cases because all of the sensitive items that might be disclosed at trial must be weighed in assessing whether the prosecution is sufficiently important to incur the national security risks.

In the past, the government has foregone prosecution of conduct it believed to violate criminal laws in order to avoid compromising national security information. The costs of such decisions go beyond the failure to redress particular instances of illegal conduct. Such determinations foster the perception that government officials and private persons with access to military or technological secrets have a broad *de facto* immunity from prosecution for a variety of crimes. This perception not only undermines the public's confidence in the fair administration of criminal justice but it also promotes concern that there is no effective check against improper conduct by members of our intelligence agencies.

While only a very small percentage of criminal cases present classified information questions, these cases often involve important matters of considerable public interest. Moreover, we are increasingly confronting classified information issues in a wide range of cases including espionage, perjury, burglary, and civil rights violations, among others. The new Foreign Corrupt Practices Act provisions and the possible enactment of a charter for intelligence activities can be expected to expand the number of cases presenting classified information problems.

This bill attempts to deal with the "graymail" problem by requiring a defendant who reasonably expects to disclose or to cause a disclosure of classified information in connection with any trial or pre-trial proceeding to notify the Government prior to trial, when possible. The Government can then move for a hearing to determine whether the information can indeed be disclosed by the defendant in the course of a trial. Following such a hearing, which would ordinarily be before trial, the court determines whether and the manner in which the information at issue may be used in a trial or pre-trial proceeding. If the defendant's right to a fair trial will not be prejudiced, the court may allow the Government to substitute a statement admitting relevant facts that the specific classified information would tend to prove or to substitute a summary of the specific classified information. If the Government objects to an order requiring disclosure, the court may impose a sliding scale of sanctions against the

Government, including finding against the Government on issues related to undisclosed evidence or dismissing the action. The Government is authorized to take interlocutory appeals, thus remedying the present situation in which the Government, even when faced with a district court ruling it believes to be wrong, must either compromise the national security information by permitting its disclosure at trial or withhold the information and jeopardize the prosecution.

Other important provisions of the bill include a requirement that when the defendant is required in the context of the pretrial hearing to disclose information to the Government prior to trial, the Government is under a reciprocal obligation to provide the defendant with information as specified by the legislation. In addition, the Attorney General must issue guidelines specifying factors to be used by the Department of Justice in rendering a decision on whether to prosecute a violation of Federal law where there is a possibility that classified information may be revealed. As a result of the guidelines, objective standards can be set rather than relying on ad hoc decisions in each case. In addition, the Attorney General must report semi-annually to the two Intelligence Committees of Congress on all cases where a decision not to prosecute a violation of Federal law has been made. This will permit congressional oversight of "graymail" cases that occur in the future.

SECTION-BY-SECTION ANALYSIS

Section 1.—Definitions

The term "classified information" is intended to include information covered by Executive Order 12065 and covered in any successive order and "restricted data" as defined in the Atomic Energy Act of 1954, and any Executive Order, statutes, regulations supplementing or superseding any of these.

The term "national security" is defined to mean the national defense and foreign relations of the United States.

Section 2

This section makes it clear that judges may use the authority granted under Federal Rule of Criminal Procedure 17.1 in cases involving "graymail". Rule 17.1 states in part that "at any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial." Under the procedures envisioned by this act, a pre-trial conference is highly appropriate. A conference will aid in ensuring that issues involving classified information are identified at the earliest possible time. At the conference, the court should set a schedule for discovery of classified information, for notice by the defendant who reasonably expects to disclose or cause the disclosure of classified information as required by section 5, and for the hearing on questions relating to the use of classified information.

Section 2 also provides that "the court may consider any matter which may promote a fair and expeditious trial." While this provision gives the court the same latitude as rule 17.1, it should be emphasized that no substantive issues concerning the use of classified information are to be decided in a "pre-trial conference" under this section; instead,

the bill requires such issues to be decided at the hearing under section 6.

Where the bill prescribes no schedule for certain actions to be taken, the court is to set a schedule for compliance with the provisions of the bill. For example, the court should set a time limit for the Government to move for an *in camera* hearing after it has received notification pursuant to section 5.

Section 3.—Protective Orders

The court is given authority to issue orders protecting against the disclosure of classified material in connection with the prosecution by the United States. To the extent that such information has been given to the defendant in the course of discovery under Federal Rule of Criminal Procedure 16, this authority makes explicit the protective orders permitted under that rule. An order protecting materials given defendant under Rule 16 (or "*Brady*" materials) can forbid disclosure by a defendant or an attorney in any context. If the defendant already had classified materials in his possession, such a protective order can prevent disclosure in connection with the trial but it cannot be expected to reach disclosure outside the trials. Federal criminal statutes apply to such disclosures. The details of each order are fashioned by the trial judge according to the circumstances of the particular case. The terms of the order may include, but need not be limited to, provisions: (1) prohibiting the disclosure of the information except as authorized by the court; (2) requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed; (3) requiring controlled access to the material during normal business hours and at other times upon reasonable notice; (4) requiring the maintenance of logs recording access by all persons authorized by the court to have access to the classified information in connection with the preparation of the defense; (5) requiring the making and handling of notes taken from material containing classified information; and (6) authorizing the assignment of government security personnel and the provision of Government storage facilities. Punishment for violation of a protective order would be contempt of court.

Section 4.—Disclosure of Classified Information to Defendants

In responding to the defendant's discovery request (or in supplying "*Brady*" materials), the court may authorize the Government to delete certain items of classified information, to substitute a summary of the information, or to substitute a statement admitting the facts that classified information might prove. When pertaining to discovery materials, this provision should be viewed as clarifying the court's powers under Federal Rule of Criminal Procedure 16(d)(1). This clarification is necessary because some judges have been reluctant to use their authority under the rule although the advisory comments of the Advisory Committee on Rules states that "among the considerations taken into account by the court" in deciding on whether to permit discovery to be "denied, restricted or deferred" would be "the protection of information vital to the national security."

Section 5.—Notice of Defendant's Intention to Disclose Classified Information

Subsection (a) states that when a defendant expects to disclose or cause the disclosure of classified information in a trial, he must notify

the Government and the court before trial or during trial as soon as he discovers the possibility. Notice must be given to the court and to the attorney for the Government within the time specified by the court or, when no time has been specified, 30 days prior to trial. The defendant is under a continuing obligation to notify the Government of any classified information it reasonably expects to disclose or cause to be disclosed. If the defendant learns of such additional classified information he must give notice to the court and the Government as soon as possible. This subsection is intended to cover not only information that the defendant plans to introduce into evidence, or to state in open court, but also information which will be elicited from witnesses and all information which may be made public through defendant's efforts.

This subsection is not intended to be a prior restraint on defendant's right to free speech, but only to forbid disclosure of classified information in the context of trials or pre-trial proceedings until notice has been given and the Government has been afforded an opportunity to avail itself of the procedures of this act.

Subsection (b) states that when the defendant fails to give notice as required by subsection (a), the court may forbid disclosure of classified information that was not made the subject of notification and it may prohibit the examination by the defendant of any witness with respect to any such information.

Section 6.—Procedure for Cases Involving Classified Information

This section is the heart of the bill. It establishes a procedure for a hearing often *in camera*, with both the prosecution and the defense present. The purpose of the hearing is to determine before trial whether the classified information at issue is admissible and in what form it may be introduced.

Subsection (a) establishes procedures for a motion for a hearing. Once the Government learns that the defendant may disclose or cause to be disclosed classified information, it may move for a hearing. The court is to set the time limits for the Government's motion, connection with its motion for a hearing, the Government may submit the classified information along with an explanation for the basis of the classification to the court for its examination *in camera*. At the subcommittee hearings Morton Halperin, Michael Scheininger, and Professor William Greenhalgh argued that the Government might submit an explanation of the basis for the classification to the court for its examination *in camera* even before the arguments on relevance or admissibility. They believe that the judge may be influenced by the government's explanation and as a result would treat the information in question differently simply because it is classified.

On the other hand, it has been argued that the judge will be operating in a vacuum if he is simply told that information contained in a given document is classified and not told why. For example, the classified information might be the name of an agent, and the defense might be perfectly willing to have the name of the agent replaced by the term "a CIA agent." If the judge does not know why the material is classified, he would have to render a decision on its admissibility and relevance before he discovered the reason for its classification. This makes no sense. The Federal district court judge must be relied on to fashion creative and fair solutions to these problems; to do so, he must know the reason for the classification before deciding on relevance and admissibility.

The hearing, or a portion of the hearing, is held *in camera* when the Government certifies that a public proceeding might result in the compromise of classified information. It is hoped that the hearings will be held publicly as often as possible. At public hearings the parties can talk about certain information in the abstract. For example, as Phillip Lacovara stated to the Select Committee on Intelligence, "it is highly doubtful that the defendant is entitled to introduce background information of a classified nature designed to show what his false answers were designed to conceal" in a perjury prosecution. Thus, the question could simply be whether the defense is entitled to introduce such information and this can be argued in public because no specific information need be proferred to resolve the general question of admissibility. On the other hand, the committee recognizes that there may be times in which discussion of an issue in a public hearing would compromise the integrity of the sensitive information.

Paragraph (b)(1) provides that although the hearing may be *in camera*, it is not to be *ex parte*. The Government must provide the defendant with notice of the information that will be at issue in the hearing. If the information at issue has previously been made available to the defendant through discovery or by other means, the notice will identify it specifically. If the Government has not previously made the information available to the defendant, the Government may describe the information by generic category approved by the court. Thus, the Government would not have to disclose the identity of an undercover intelligence agent not previously disclosed to the defendant; instead, the Government would describe the information as "the identity of an undercover intelligence agent" if this meets with court approval.

Paragraph (b)(2) provides that following the hearing, the court must determine whether and the manner in which the information at issue may be used in a trial or pre-trial proceeding. This provision is intended to retain current practices. A defendant should not be denied the use of information that he would otherwise use simply because of the procedures of this bill. Thus, on the question of a standard for admissibility of evidence at trial, the committee intends to retain current law regardless of the sensitivity of the information. Some Senators on the committee believe that a judge should rule any "relevant" evidence admissible. On the other hand, the Department of Justice has argued that classified information is analogous to information regarding identification of informants and that the standard for introduction of classified information must be "relevant and material" or "relevant and helpful."

Paragraph (b)(3) identifies several remedies available to the judge after the hearing established by paragraph (b)(2):

Under subparagraph (b)(3)(A), the court may simply determine that the information which the defendant wishes to use in the course of a trial may not be disclosed or elicited by the defendant. In such a case, the record of the hearings is sealed and preserved by the Government in the event of an appeal by the defendant after trial. The defendant may also seek reconsideration of the court's determination prior to or during trial.

Under subparagraph (b)(3)(B), instead of authorizing disclosure of the specific classified information in question, the court shall, if it

finds the defendant's right to a fair trial will not be prejudiced, order substitution of a statement admitting relevant facts that the specific classified information would tend to prove, or substitution of a summary portion of a specific piece of classified information. Again, this provision rests on the presumption that the defendant should not stand in a worse position, because of the fact that classified information is involved, than he would without this Act. At the same time, if there is no prejudice to the defendant's right to a fair trial as a result of the substitutions, they are clearly preferable to disclosing information that would do damage to the national security. For example, where the defendant wished to show that he had access to a particular type of classified data, it should be sufficient for the Government to admit that the defendant has had such access rather than forcing the introduction of the actual classified data in question. The judge should ensure that a substitution of a statement admitting relevant facts or of a summary or portion of the specific classified information is crafted so that the Government obtains no unfair advantage in the trial.

Under subparagraph (b) (3) (C), the court must take specific actions when no substitution of a statement admitting relevant facts or a summary portion of classified information is sufficient to ensure that a defendant's right to a fair trial will not be prejudiced. Of course, in such a case the Government can accede to the use of the information in trial. In cases where the information is so sensitive that this alternative is unacceptable to the Government on the grounds of national security, a high official of the Department of Justice can object to the disclosure of the information. The court then must issue an order that is designed to ensure that the defendant's ability to prepare for his defense is not impaired due to the Government's decision not to disclose the information. In testimony before the Senate Intelligence Committee, Phillip Lacovara, former Deputy Solicitor General, explained that a sliding scale of sanctions can be taken against the Government when the Government has a legitimate claim that national security information cannot be disclosed."

> At one end of the scale, for example, if the defendant's possible use for the information is totally speculative, the case simply could be continued without disclosure. At the other end of the scale, where the information is central to the question of guilt or innocence and where no alternative to public disclosure is possible, dismissal may be necessary. In between, procedures such as instructing the jury to assume that the missing information would have proved a given proposition may be possible. Certainly the Department of Justice should press for some intermediate treatment like that before deciding that the case must be abandoned.

It should be emphasized, however, that the court should not balance the national security interests of the Government against the rights of the defendant to obtain the information. The sanctions against the Government are designed to make the defendant whole again. After the judge has issued this order, the Government may exercise its right to take an interlocutory appeal.

Subsection (c) establishes procedures relating to reciprocity. In some ways the procedures envisioned by this bill are analogous to

those contained in Federal Rule of Criminal Procedure 12.1. Under that rule, the defendant must give prior notice of an intention to use an alibi, including the specific place or places for which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses on whom he intends to rely to establish such alibi. As a matter of reciprocity, the Government must serve upon the defendant written notice of the names and addresses of the witnesses the Government intends to use to rebut an alibi defense. This reciprocity is required so that neither side obtains an unfair advantage in a criminal trial. Because under S. 1482 the defendant is required to give prior notice of an intention to use or elicit classified information, and thereby he may be required to disclose information not otherwise discoverable by the Government, subsection (c) requires the Government to disclose information it expects to use to rebut the classified information which the defendant plans to use or to elicit, unless the court finds that the interests of fairness do not require such disclosure. Without reaching the question of whether such reciprocity is constitutionally required (see *Wardius* v. *Oregon*, 412 U.S. 470, 1973), the committee believes that placing such a reciprocal duty on the Government is a matter of fairness. Again, like in Rule 12.1, the court may place the Government under a continuing duty to disclose such rebuttal information; if the Government fails to comply with its obligation under this section, the court may take sanctions against it.

Section 7.—Interlocutory Appeal

This section authorizes the government to take interlocutory appeals from adverse district court orders relating to the disclosure of information. This section is essential to the statutory scheme envisioned by S. 1482. Without such a procedure, the district court could issue an order that could have the effect of making highly sensitive information public. The government would then face a choice of disclosing information or having the case dismissed, for under current law, the government has no right to appeal such a decision.

This section also responds to the need to protect the defendant's interests in a speedy trial. Most interlocutory appeals should take place prior to trial; however, this section permits interlocutory appeals during trial and contains provisions to ensure that such appeals would be resolved quickly, in order to avoid disruption of the trial.

Section 8.—Introduction of Classified Information

Subsection 8 (a) states that writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status. This provision does not affect the classified status of information introduced into evidence. It simply recognizes that classification is an executive, not a judicial function. The subsection allows the classifying agency to decide whether the information has been so compromised during trial that it could no longer be regarded as classified. The Committee intends to take no position on the question of whether information which is part of a trial record can be withheld from the public after trial.

Subsection (8) (b) clarifies the rule of evidence, known as the rule of completeness, now included in Rule 106 of the Federal Rules of Evidence. That rule states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at the time to introduce any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

In order to prevent "unnecessary disclosure" of classified information, subsection (b) permits the courts to order admission into evidence of only a part of a writing, recording, or photograph. However, subsection (b) does not provide grounds for excluding part of a writing or recorded statement "which ought in fairness to be considered contemporaneously with it." Thus, the court may order admission into evidence of only part of a writing, recording, or photograph only when fairness does not require the whole document be considered.

Assistant Attorney General Heymann explained the value of subsection (b):

> In the recent espionage prosecution and the Kampiles case, the government introduced into evidence a copy of a highly classified manual with certain extremely sensitive items deleted. This step, which was taken with the consent of the defendant, protected the material from unnecessary exposure. Section 8(b) of S. 1482 would permit the court, over objection of the defendant, to order that this approach be followed in future cases . . . The defendant's rights would be protected since the court would hear any arguments the defendant chose to offer against permitting the deletions and the defendant would be free to demonstrate that the deleted portions should be disclosed, where, for example, they represent a relevant and material part of his defense.

Subsection 8(c) provides a procedure to address the problem presented during a pre-trial or trial proceeding when the defendant poses a question or embarks on a line of inquiry that would require the witness to disclose classified information. If the defendant knew that a question or line of inquiry would result in disclosure of classified information, he presumably would have given the government notice of such a case and the provisions in section 6 could be used. This provision serves in effect as a supplement to the hearing provisions of Section 6 to cope with situations which cannot be handled effectively under that section—e.g., where the defendant does not realize that the answer to the question will be classified.

Section 9

Section 9 is based on the Section 103(c) of the Foreign Intelligence Surveillance Act which has worked well in practice in preventing the compromise of classified information submitted to the Federal courts.

Section 10.—Identification of the Information Related to the National Defense

This section would require the Government in espionage and other criminal cases involving the transmittal of classified information to identify those materials it expects to rely on to demonstrate the national defense or classified information element of the offense. In the

past, a defendant accused of transmitting large quantities of information often would not know which parts of this body of information would be relied on to prove the offense. The procedure provided under this section would give the defendant the time to prepare a defense based on knowledge of the specific materials the Government intends to rely on.

Section 11.—Amendments to this Act

This section provides that this act may be amended in the same manner as the Federal Rules of Evidence.

Section 12.—Attorney General Guidelines

The bill requires the Attorney General to issue guidelines specifying the factors to be considered by the Department of Justice in deciding whether to prosecute a violation of federal law where there is a possibility that classified information will be revealed and requires written findings before such a case can be dropped. These requirements are intended to demonstrate a clearly stated congressional intention favoring punishment of illegal activity even when there are national security considerations. The committee does not intend that these guidelines be subject to judicial review; they are not intended to confer any new rights on defendants.

In the past, there has been the appearance of abuse of prosecutorial discretion in cases involving classified information. Thus, it is important that there be guidelines dealing with cases involving classified information and findings when such cases are not prosecuted. However, the Committee recognizes in subsection (c) that prosecutorial discretion is very much an Executive branch prerogative. Thus, Congress should not insert itself too far into the department's exercise of its discretion. At the same time, Congress has the constitutional power of inquiry; thus, the Attorney General is required to report semi-annually in all cases where a decision not to prosecute was made. The Attorney General may delegate this authority but the delegate presumably will be a Senate-confirmed official. The report will be made to the intelligence committees of Congress, the repositories of much sensitive information. In a case where the briefing is oral, the Intelligence Committees will keep a written transcript, and will inform the Judiciary Committee of information within its jurisdiction pursuant to Senate Resolution 400, 94th Congress or House Resolution 658, 95th Congress.

Section 13—Reports to Congress

In the first three years this bill is in operation, the appropriate committees of Congress, the Judiciary and Intelligence Committees of the two Houses, should conduct vigorous oversight on the efficacy of the procedures embodied in the act. The Attorney General is required to transmit any suggestions he may have to these committees for the first three years the Act is in effect. After that time, the reports can be submitted as necessary. This requirement of reports from the Attorney General, should, in no way, prejudice the congressional committees from undertaking oversight on their own.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., May 30, 1980.

Hon. EDWARD M. KENNEDY,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1482, the Classified Information Procedures Act, as ordered reported by the Senate Committee on the Judiciary, May 20, 1980.

The bill allows classified information to be reviewed privately by the court prior to trial proceedings. S. 1482 also permits the use of substitute forms of the classified material, such as a summary or a statement of facts. The bill requires a defendant to give notice of his intent to disclose the information and allows the Government to request a hearing concerning the information, to be held in private. The court may then determine whether and the manner in which the classified information may be used. The bill also describes the procedures to be followed in the event of an appeal by the United States of a court decision to disclose classified information.

Because few cases will be affected by this legislation, the provisions of this bill are not expected to add significantly to the burdens of the judicial system. Thus, it is expected that no significant additional cost to the Government would be incurred as a result of enactment of this bill.

Sincerely,

ALICE M. RIVLIN, *Director.*

REGULATORY IMPACT STATEMENT

In compliance with paragraph 5, rule XXIX of the Standing Rules of the Senate, it is hereby stated that the committee anticipates that the bill will have no additional direct regulatory impact. After due consideration, the committee has determined that the changes in existing law contained in the bill will not increase or diminish any present regulatory responsibilities of the U.S. Department of Justice or of any other Department which exercises a law enforcement responsibility.

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